

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF: )

CITY OF OSKALOOSA, )  
Public Employer, )

and )

OSKALOOSA ASSOCIATION OF )  
PROFESSIONAL FIRE FIGHTERS, )  
Certified Employee )  
Organization/Petitioner. )

CASE NO. 5173

FILED  
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PUBLIC EMPLOYMENT  
RELATIONS BOARD

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) on appeal from a proposed decision and order of an administrative law judge in an amendment of bargaining unit proceeding filed by the Oskaloosa Association of Professional Fire Fighters (the Association). Following an evidentiary hearing the ALJ concluded that the fire captains employed by the City of Oskaloosa (the City) were not supervisory employees within the meaning of Iowa Code section 20.4(2) and were appropriately included within the existing unit, and proposed that the unit's composition be amended to include the captains. The City appealed from the ALJ's proposal to the full Board.

Pursuant to PERB subrule 621-9.2(3), we have heard the case upon the record submitted before the ALJ. Oral arguments to the Board on appeal were heard on February 13, 1995, Randy DeGeest appearing for the City and Jack Reed for the Association. Both parties filed briefs on appeal. Pursuant to section 17A.15(3),<sup>1</sup>

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<sup>1</sup>This and all subsequent statutory citations are to the Code of Iowa (1993).

on this appeal we possess all powers which we would have had had we elected, pursuant to PERB rule 621-2.1, to preside at the evidentiary hearing in place of the ALJ.

Based upon the entire record in this matter, and having considered the parties' oral arguments and briefs, we issue the following findings of fact, conclusions of law and order.

#### FINDINGS OF FACT

The City is a public employer within the meaning of section 20.3(11) and the Association is an employee organization within the meaning of section 20.3(4).

In 1979 the Association was certified by the Board as the exclusive bargaining representative for the unit. By virtue of a 1986 amendment, the bargaining unit presently represented by the Association is described as:

INCLUDED: All fire fighters for the City of Oskaloosa.

EXCLUDED: Fire chief, assistant fire chief, fire captains.

The exclusion of fire captains from both the original and amended units was the result of stipulations filed with the Board. No contested proceedings have occurred in which the fire captains were determined to be outside the scope of the Public Employment Relations Act (the Act), Iowa Code ch. 20.

The City's fire department is currently staffed by the fire chief, three fire captains and 12 fire fighters. The position of assistant fire chief noted in the unit description has been vacant since before 1990, and no plans exist for it to be filled.

The department provides fire protection and ambulance services to an area of approximately 250 square miles which includes the cities of Oskaloosa, Beacon, Keomah Village and University Park, as well as parts of Mahaska County.

The fire chief's usual work schedule is 8:00 a.m.-5:00 p.m. Monday through Friday. All other department employees work on a rotating 24-hour shift schedule, with one fire captain and four fire fighters assigned to each shift. Each shift works a cycle of 24 hours on duty (commencing at 7:30 a.m.), followed by 24 hours off, 24 on, 24 off, 24 on and 96 off.

Due to the around-the-clock nature of the department's operation and the assignment of a fire captain to each shift, a captain is on duty at all times except when absent due to vacation, illness or other contingency, and is the highest-ranking officer on duty whenever the fire chief is not present--a situation which exists more than 75 percent of the total time.

The fire chief is appointed by the City manager subject to City Council approval. The chief is the commanding officer of the department, its chief administrator and supervisor, and is ultimately responsible for the entirety of its operations. Although he works a regular daytime schedule, the chief may return to duty during his off hours should any situation arise which he deems to warrant his presence.

The chief does not, however, routinely participate personally in the department's response to either fire or ambulance calls. During the 12-month period ending August 31, 1994, the chief

responded personally to only 32 of the 296 fire calls received, and to only 14 of the 1,347 ambulance calls.<sup>2</sup>

The chief is exclusively responsible for the assignment or reassignment of personnel among the department's three shifts. Minimum staffing requirements for the shifts have been established, as have departmental rules and regulations and standard operating procedures for many of the department's functions. As contemplated by the department's regulations, one captain has been assigned by the chief to each of the shifts, and the captain functions as that shift's commanding officer.

A relatively small operation consisting of only 15 shift employees, the department enjoys a very low employee turnover rate, with the result that its personnel are well trained and experienced in the performance of their various functions. The fire fighters, as well as the captains, are all trained in the use of all of the department's equipment, and their close working relationship and extensive experience have produced an operation where each member knows how to perform his assigned task, and does so without constant direct supervision.

What a given fire fighter's job is during any given 24-hour shift is, however, determined by the captain in command of that shift. The chief plays no role in the captain's intra-shift assignment of duties.

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<sup>2</sup>Twenty-two of the chief's personal responses to fire calls were from off-duty status, and he returned to duty for only five ambulance calls.

Two fire fighters are generally assigned by the shift's captain to man the ambulance, leaving the captain and two other fire fighters to respond to fire calls. While a longstanding practice exists in the department whereby the fire fighters on a shift are rotated between fire and ambulance functions, the rotation pattern is within the captain's discretion, and the rotations devised and utilized by each of the captains differs from that employed on the other shifts.

At the 7:30 a.m. commencement of each shift, the captain assigns fire fighters to daily duties. Although the chief is generally present at the station beginning at 8:00 a.m. Monday through Friday, he takes no part in the assignment of daily duties. Regular daily duties, in addition to responding to fire or ambulance calls, include checking, cleaning and maintaining the department's equipment, housekeeping functions at the station itself and conducting various drills. Although many of the daily duties assigned by the captain involve routine, repetitive tasks, other less-frequently-occurring functions, such as fire fighter presentations at public education classes, are also assigned by the captains at their discretion.

Departmental procedure directs that in the event of a personal emergency the officer in charge of each shift will relieve the affected employee from duty. The captains determine under what circumstances a personal emergency exists, and allow the fire fighter involved time off in accordance with the policy, although the chief is consulted and becomes involved if an extended leave is

required. Only the chief is authorized to grant extended leaves or the trading of time between fire fighters.

In the day-to-day operation of the department a captain and the fire fighters on his shift work side by side at both the station and on calls. They live together, eat together and occupy the same sleeping quarters during their shift.

When an ambulance call is received the response is usually by the two fire fighters assigned to the ambulance. However, established operating procedures call for a three-person response to calls involving certain types of patients, in which cases the captain also responds. In such cases the captain commands the response, although pursuant to law the employee with the highest level of emergency medical technician training, regardless of departmental rank or seniority, is in charge of the patient's medical treatment and makes any necessary treatment decisions.

Upon receipt of a fire call the shift's captain and the two fire fighters previously assigned respond, except in those cases where the captain is absent. The captain, or fire fighter designated as acting captain during a captain's absence, commands the response. Although the department's fire fighters are trained and experienced and typically can anticipate what will be required on a given call, the captain must ensure that the truck is properly positioned and that appropriate equipment is selected. One fire fighter on the fire response crew will have been preassigned by the captain to operate the pump, leaving the captain and the other fire fighter to directly address the fire itself.

At the fire scene the fire fighters typically do not await direction, generally knowing what to do under the circumstances based upon their training and experience. While the fire fighters thus frequently operate with little or no direction from the captain, judgments do need to be made at the scene depending upon the circumstances, and those judgments are made by the captain except in the relatively rare occasions when the chief too responds and assumes command.

At a fire scene the captain initially assesses whether a rescue is required, what stage the fire is in and where to locate the necessary equipment. Although not a frequent occurrence for the Oskaloosa department, the designation of personnel to execute a rescue from a burning structure is a decision made by the captain. On at least one shift the captain has determined that he will be the first to enter the structure, so as to better assess the situation and determine how to utilize the department's resources. The captain may be required to adjust fire fighter activity which is already underway. Based upon his assessment of the situation, the captain issues any orders to fire fighters which he deems necessary under the circumstances.

Part of the captain's assessment involves whether additional personnel or equipment is necessary at the scene. Should the captain judge it necessary, he possesses the authority to call in off-duty fire fighters, or to summon fire crews from surrounding communities, without first securing the approval of the fire chief. Should the fire involve a major structure, a personal injury, or if

arson is suspected, the captains have been instructed to contact the fire chief, who then also responds to the scene.

In addition to ensuring that adequate manpower and equipment responds to a fire or ambulance call, the captains are responsible for seeing that the minimum staffing requirement is met. Consequently, if confronted with unexpected absences leaving a shift below minimum staff, a captain calls in off-duty fire fighters as necessary to meet staffing requirements. No prior authorization of the chief is required for the captain to summon the necessary help, although the chief is later notified of the captain's activity.

The captains are charged with the responsibility of initiating periodic performance evaluations of the fire fighters on their respective shifts. During a new fire fighter's 12-month probationary period, his or her performance is evaluated monthly by the captain, who assigns a grade to each of a number of established performance criteria. The captain reviews the probationary fire fighter's performance evaluation with the employee, pointing out areas of strength and weakness, and forwards the evaluation to the chief, who reviews the evaluation and makes any additional remarks he deems appropriate. The chief may meet with either the probationary employee or the captain, or both, especially if the monthly evaluation contains any unsatisfactory grades or remarks.

At the conclusion of the probationary period a captain may recommend that the fire fighter be accorded regular employee status, may recommend that regular status not be granted, or may



make no express recommendation. There is no evidence that a captain has ever expressly recommended that a probationer not be granted regular employee status. The chief, recognizing that the captain has worked more closely with the probationer than he has, gives substantial weight to the monthly evaluations and any recommendations made by the captain, but would investigate with the captain any recommendation not to grant regular employee status. Ultimately, it is the chief who decides, based upon his familiarity with the probationer, the captain's evaluations and recommendations, and any discussions with the captain or employee, whether the probationer will be granted regular status.

As to non-probationary fire fighters, the captain performs annual performance evaluations for those on his shift, assigning a "satisfactory" or "unsatisfactory" rating to each of a number of established performance criteria. The evaluation is forwarded to the chief for his review and his addition of any remarks deemed appropriate, then to the fire fighter who is the subject of the evaluation for his comments and signature before being passed on to the city manager for review and his addition of any comments.

Although captains could make recommendations about matters including the possible promotion or termination of a non-probationary fire fighter, no such recommendations appear to have been made during the present chief's tenure of over seven years. Should a recommendation to discharge ever be made by a captain, the chief would review the employee's past evaluations and investigate the employee's performance with others on the shift, including the

captain, before discussing the matter with the city manager who, rather than the chief, is ultimately responsible for any termination decisions. The chief possesses the authority to change a captain's evaluation of a fire fighter, but apparently has never done so, although the chief once requested that a captain change an evaluation that was before the chief for his review.

The grievance procedure set forth in the collective bargaining agreement between the Association and the City requires that disputes between the employer and the Association or any employee concerning the interpretation, application or violation of any term of the agreement be initiated orally with the grievant's "immediate supervisor". This provision appears to have been uniformly interpreted by the parties as identifying the captain as the "immediate supervisor". While it is clear that the captains have resolved "gripes" that have arisen between fire fighters, there is no evidence that they possess the authority to, or have ever purported to adjust or in any way directly affect the employer's interpretation or application of the terms of the collective agreement, thus actually resolving true grievances at the initial step. Actual grievances proceed beyond the captains to the chief, the city manager or, ultimately, to a grievance arbitrator.

Promotion from fire fighter to the next-higher rank (captain) is based primarily upon the candidate's completion of a civil service promotional examination. Those passing the examination are placed upon an eligible list, and should a promotional opportunity arise, the record suggests that the candidate's performance

evaluation would be considered in making the promotion, although it does not reveal whether the chief, city manager or city council would make the ultimate decision.

Captains possess no direct authority to discipline or reward the fire fighters beyond verbal reproach or praise. Nor do they have the authority to hire, transfer, suspend, layoff or recall from layoff.

#### CONCLUSIONS OF LAW

##### I.

Initially, we address the Association's contention, raised during oral arguments, that the City's appeal should be dismissed due to its failure to include in its notice of appeal any grounds for disturbing the ALJ's proposal, a requirement of PERB's rules according to the Association.

As mentioned briefly in our initial statement of the case, the Board, on appeal from an ALJ's proposed decision, possesses all the powers we would have possessed had we personally presided at the evidentiary hearing, except as we may limit the issues on notice to the parties or by rule. See section 17A.15(3). We thus review the record made before the ALJ *de novo*, with full authority to find facts anew and to draw our own conclusions concerning the issues involved.

Although we have long viewed such a review as our role in intra-agency appeals, we have recognized that former PERB subrules 621-9.2(1) and (2), purportedly setting forth "grounds for appeal" and requiring such grounds to be set forth in notices of appeal,

might be construed as a section 17A.15(3) limitation of the issues restricting our role on appeal to a review of only assigned errors or grounds.

We do not believe that such was the intent of former rule 621-9.2 when it was initially adopted, although that is now a matter of little import due to our amendment of the rule which became effective in February, 1994. Rule 621-9.2 in its present form makes no reference whatsoever to "grounds" for appeal from an ALJ's proposed decision. The only "ground" necessary is that one of the parties to the proceeding does not wish the ALJ's proposal to become the final agency action.

Consequently, the City was not required to set forth any grounds or specify any errors allegedly committed by the ALJ in its notice of appeal in order to bring the case before us for our de novo consideration of the evidence and issues.

## II.

A. The Association's petition for amendment of the existing bargaining unit is a type of unit determination, ultimately governed by section 20.13. As did the ALJ, we conclude that none of the unit determination criteria of section 20.13(2) militates against the inclusion of the captains in the unit. Nor does the City resist their inclusion on section 20.13 grounds.

Instead, the issue here is whether the captains are "public employees" within the meaning of section 20.3(10) and thus covered by the Act and eligible for unit inclusion, or whether they are

excluded from coverage and precluded from any unit by virtue of section 20.4(2). Those sections provide, in relevant part:

**20.3 Definitions.**

When used in this chapter, unless the context otherwise requires:

10. "Public employee" means any individual employed by a public employer, except individuals exempted under the provisions of section 20.4.

**20.4 Exclusions.**

The following public employees shall be excluded from the provisions of this chapter:

2. Representatives of a public employer, including the administrative officer, director or chief executive officer of a public employer or major division thereof as well as the officer's or director's deputy, first assistant, and any supervisory employees.

"Supervisory employee" means any individual having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. . . .

The supervisory exclusion of section 20.4(2) has two components. First, the employee must have the authority to accomplish one of the specified functions. This requirement is in the disjunctive, therefore the possession of any one of the specified functions justifies a finding of supervisory status. City of Davenport v. PERB, 264 N.W.2d 307, 314 (Iowa 1978). Second, the employer's exercise of that authority must require the use of independent judgment, be of more than a routine or clerical nature, and be in the interest of the public employer. Id.

B. There is no evidence in the record which could lead one to the conclusion that the captains are supervisors due to their

possession of the authority to hire, transfer, suspend, layoff or recall other public employees. Nor is there evidence that the captains are empowered to directly promote, discharge, reward or discipline.

Consequently, if the captains are supervisory employees within the meaning of section 20.4(2), as the City urges, such a conclusion must be premised upon their authority to assign, direct or adjust the grievances of other public employees, or their authority to make effective recommendations concerning one or more of the supervisory functions. The City suggests that the captains should be found to be supervisors on all four of these bases.

We agree with the ALJ's conclusion that the captains are not supervisors based upon what the City has referred to as their "involvement" in the contractual grievance procedure. While the collective agreement's provisions clearly contemplate participation by the grievant's immediate supervisor, presumably the captain, mere participation or "involvement" in the process is not equivalent to the authority to actually adjust disputes concerning the interpretation or application of the collective agreement. There is no evidence that a captain has ever adjusted a true grievance, as opposed to mere disputes between fire fighters, and the record suggests that actual grievances often bypass the captains entirely and are addressed initially by the chief.

We also share the ALJ's conclusion that the captains are not properly viewed as supervisory employees based upon their authority

to make effective recommendations concerning any of the supervisory functions.

While the City apparently recognizes that the evaluation of other public employees is not itself a supervisory function, it seemingly suggests that the captains' performance evaluations of the fire fighters may constitute their effective recommendation concerning their promotion, discharge, reward or discipline.

We have consistently defined the supervisory authority to "effectively recommend" within the meaning of section 20.4(2) as a decision which is made at the chief executive level or below which is approved by higher authority without independent review or de novo consideration as a matter of course. See, e.g., Davenport Community School District, 76 PERB 72; City of West Des Moines, 95 PERB 5158.

It is far from clear from the record that the captains have in fact made actual recommendations concerning the discharge, reward or discipline of fire fighters. Although the record is clear that if such a recommendation were made the chief would give it great weight, it is also clear the chief would independently investigate and consider the situation before taking any action.

While we did conclude in one recent case that evaluations constituted the effective recommendation of reward (salary increases) warranting the evaluators' exclusion as supervisors,<sup>3</sup> the facts of that case, and the effect of the evaluations performed by those supervisors, are clearly distinguishable from the instant

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<sup>3</sup>See City of West Des Moines, 95 PERB 5158.

situation. Here, there is absolutely no indication that a satisfactory evaluation by a captain virtually automatically results in any type of reward for the employee evaluated, without further consideration by higher authority.

Nor can we conclude that the captains' evaluation of fire fighters, either probationers or regular employees, constitutes effective recommendation concerning promotion. There is no evidence that a captain has ever actually recommended the promotion of a regular fire fighter, the captains apparently recognizing that promotion is driven primarily by the civil service testing procedure. Even if one assumes that a captain's recommendation that a probationary fire fighter be granted regular employee status may constitute a recommendation of a "promotion," it is apparent that the chief, while giving weight to the captain's recommendation, separately considers the situation and makes an independent determination as to whether the probationer will continue as a regular employee. The fact that the evaluating captain and the chief may ultimately reach the same conclusion does not mean that any recommendation which may have been made by the captain was simply approved without independent review.

C. The remaining supervisory functions advanced by the City in support of the proposition that the captains are excluded by section 20.4(2) are their authority to assign and direct the fire fighters. The ALJ, viewing the captains' assignment and direction functions as not requiring the sufficient use of independent judgment in the employer's interest to bestow supervisory status,



characterized them instead as leadpersons and proposed they be included in the unit.

On appeal, both parties have focused extensively upon perceived similarities or distinctions between the authority possessed by the Oskaloosa captains and that of employees whose section 20.4(2) status has been determine in other cases. However, it is well established that the determination as to the existence of supervisory status is a fact question which "involves a case-by-case approach in which the agency gives practical application of the statute to the infinite and complex gradations of authority which may exist in employment." City of Davenport v. PERB, supra 264 N.W.2d at 313. It seems axiomatic to us that such a case-by-case approach would be inhibited by undue emphasis upon prior supervisory determinations, the facts of which are always distinguishable to some degree from those of the case pending before us.<sup>4</sup>

While it is clear to us that certain aspects of the captains' authority to assign and direct fire fighters is routinely exercised and is not a sufficient basis upon which to characterize them as supervisors, when we consider the entirety of the record we find that we do not share the ALJ's ultimate conclusion.

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<sup>4</sup>Although believing that consistency of reasoning, rather than efforts to distinguish or reconcile fact patterns is the key to supervisory determinations, when we consider the cases cited by the parties we do note facts which distinguish this case from the facts of City of Davenport v. PERB, 264 N.W.2d 307 (Iowa 1978) and City of Des Moines v. PERB, 264 N.W.2d 324 (Iowa 1978), and which in our view make it more analogous to those of City of Fort Madison, 80 PERB 1471, in which fire captains were found to be supervisors within the meaning of section 20.4(2).

We believe the record supports the conclusion that the captains have exercised independent judgment in the interest of the City in their assignment of their shift's fire fighters to the apparatus they will man during that shift. While it is clear that the established departmental practice is that fire fighters will in fact be rotated between ambulance and fire fighting functions, all details of the rotation are within the exclusive discretion of the captains, who exercise it differently. One captain appears to rotate employees, at least in part, to relieve what he perceives to be the more-stressful nature of the ambulance assignment, while another indicated his rotation was to ensure that his shift's fire fighters were fully diversified and trained in all aspects of the shift's functions.

Similarly, while the captains' assignment of a fire fighter to purely routine tasks such as emptying the station's garbage cans should not be deemed to be the exercise of independent judgment in the City's interest, we view the captains' periodic exercise of independent discretion in the assignment of fire fighters to participate in public education presentations as a function more indicative of supervisory status.

We also view the captain's frequent independent command of the fire scene, and their making of decisions and their issuance of directives based upon their assessment of the circumstances, as supervisory within the meaning of section 20.4(2). It is uncontroverted that in assessing the seriousness of the fire and the level of resources necessary to deal with it, the captain has and exercises independent discretion to call in additional help,

including not only off-duty Oskaloosa personnel but also the fire departments of other communities.

Our conclusion is strengthened, we believe, by the secondary consideration which has been recognized by both PERB and the NLRB that if the captains are deemed to be leadpersons, the result would be that the fire fighters and captains would work in the absence of a supervisor more than 75 percent of the time, and that nearly 90 percent of the fire calls would be handled from start to finish without a supervisor.

The entirety of the record before us leads us to the conclusion that the responsibility and authority of the Oskaloosa fire captains substantially identify them with management and warrant their classification as supervisory employees excluded from the Act's coverage by section 20.4(2).

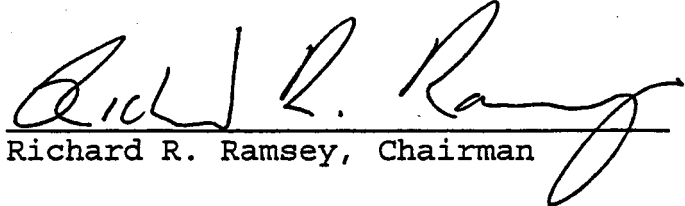
We therefore issue the following:

ORDER

The petition to amend the bargaining unit of employees of the City of Oskaloosa represented by the Oskaloosa Association of Professional Fire Fighters is hereby DISMISSED.

DATED at Des Moines, Iowa this 18th day of August, 1995.

PUBLIC EMPLOYMENT RELATIONS BOARD

  
Richard R. Ramsey, Chairman

  
M. Sue Warner, Board Member

  
Dave Knock, Board Member